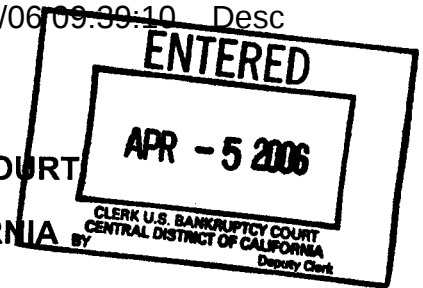


UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION



4 In re:
5
6 INLAND GLOBAL MEDICAL GROUP,
7 INC.,
8 Debtor.
9 RICHARD K. DIAMOND,
10 CHAPTER 7 TRUSTEE,
11 Plaintiff,
12 v.
13 JIN KIM, M.D.,
14 Defendant.
15

Case No. RS 02-26263 PC

Chapter 7

Adv. No. RS 04-02244 PC

MEMORANDUM DECISION

Date: March 21, 2006
Time: 9:00 a.m.
Place: U.S. Bankruptcy Court
Courtroom 303
3420 Twelfth Street
Riverside, CA 92501

16 Plaintiff, Richard K. Diamond, Chapter 7 Trustee ("Diamond") seeks to avoid
17 certain alleged preferential transfers totaling \$78,515.69 pursuant to 11 U.S.C. § 547(b).
18 Defendant, Jin Kim, M.D. ("Kim") asserts affirmative defenses to Diamond's preference
19 claims under 11 U.S.C. §§ 547(c)(2) and (4). The court conducted a trial in this
20 adversary proceeding on March 21, 2006, at which Sandor T. Boxer appeared for
21 Diamond and Stephen R. Wade appeared for Kim. At the conclusion of trial, the matter
22 was taken under submission. Having considered the pleadings, evidentiary record, trial
23 briefs and arguments of counsel, the court makes the following findings of fact and
24 conclusions of law¹ pursuant to Fed. R. Civ. P. 52, as incorporated into Fed. R. Bankr.

25

26 ^{1/} To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such.
27 To the extent that any conclusion of law is construed to be a finding of fact, it is hereby adopted as such.
The court reserves the right to make additional findings and conclusions as necessary or as may be
requested by any party.

ORIGINAL

1 P. 7052.

2 I. STATEMENT OF FACTS

3 On October 4, 2002, an involuntary chapter 7 petition was filed against Inland
4 Global Medical Group, Inc. ("Inland Global"), in Case No. RS 02-26263 PC in the United
5 States Bankruptcy Court, Central District of California, Riverside Division. An order for
6 relief under chapter 7 was entered in the case on December 27, 2002. Diamond is the
7 duly elected chapter 7 trustee of the bankruptcy estate of Inland Global, and has
8 standing to pursue the causes of action alleged in the complaint filed in this adversary
9 proceeding on behalf of such estate. At all relevant times, Kim was a licensed physician
10 rendering medical services and doing business in the state of California.

11 On or about July 8, 2002, Inland Global wrote Check # 70162 in the amount of
12 \$19,470.90, payable to Kim dated July 8, 2002. The check was paid or honored on July
13 22, 2002. On or about August 8, 2002, Inland Global wrote Check # 70774 payable to
14 Kim in the amount of \$59,044.79 dated August 8, 2002. The check was paid or
15 honored on August 21, 2002. Neither Diamond nor Kim dispute that the checks were
16 "transfers" of funds belonging to Inland Global within the meaning of the Bankruptcy
17 Code and other applicable laws. Nor do the parties dispute that (a) the subject transfers
18 were made for or on account of antecedent debts owed by Inland Global to Kim before
19 such transfers were made; (b) the subject transfers were made within 90 days before
20 October 4, 2002 - the date the involuntary petition was filed against Inland Global, and
21 (c) the subject transfers enabled Kim to receive more than he would have received if the
22 case were a case under chapter 7, the subject transfers had not been made, and Kim
23 had received payment of such debts to the extent provided by the provisions of the
24 Bankruptcy Code.

25 In support of his affirmative defenses, Kim testified that he rendered urgent care
26 services to Inland Global patients at San Antonio Community Hospital during 2002

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1 under a "Service Agreement" pursuant to which Kim and San Antonio Community
2 Hospital shared equally any revenues generated from his services. Kim testified that he
3 received a fee of \$60 per patient visit directly from Inland Global pursuant to the terms
4 of an Ancillary Care Service Agreement between Inland Global Medical Group, Inc. and
5 Jin Kim, M.D., Inc. dated May 1, 2000 ("Contract"),² and that the payment was then
6 divided equally between Kim and San Antonio Community Hospital pursuant to the
7 Service Agreement.

8 Kim testified that he provided urgent care services to "between 400 and 500
9 Inland Global patients a month" at the San Antonio Community Hospital Rancho Urgent
10 Care facility from June 2002 until November 2002. Kim did not provide billing records
11 for the patients, stating that "all of the billing records for these patient visits were
12 maintained electronically by the hospital." Kim also testified that he had patient charts
13 reflecting treatment of 1,417 patients insured by Inland Global between July 8, 2002 and
14 October 4, 2002. However, only three patient charts were attached to Kim's declaration
15 and introduced into evidence.

16 II. DISCUSSION

17 The court finds that it has jurisdiction over this adversary proceeding pursuant to
18 28 U.S.C. §§ 157(b) and 1334(b), and venue is appropriate in this court under 28 U.S.C.
19 § 1409(a). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (F) and
20 (O).

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22
23 ² The Contract, which was admitted as Defendant's Exhibit A, is signed by Jin Kim, as president of Jin Kim
24 M.D., Inc. Jin Kim M.D., Inc. is the only professional listed in Exhibit A to the Contract who is authorized to
25 render services on behalf of Inland Global under the Contract. At trial, Kim did not testify as president of
26 Jin Kim M.D., Inc. Kim, individually, testified that he "entered" into the Contract with Inland Global and that
27 all services to Inland Global patients were rendered under the Contract. However, each of the subject
transfers sought to be avoided by Diamond were payable to Kim individually. There is no evidence of a
separate contract between Inland Global and Kim, individually, for urgent care services to Inland Global
patients during the period of July 8, 2002 to October 4, 2002.

1 **A. Contentions of the Parties.**

2 The parties do not dispute that the subject transfers constitute preferential
3 transfers by Inland Global to Kim totaling \$78,515.69 pursuant to § 547(b). Plaintiff
4 claims that he is entitled to recover the sum of \$78,515.69 from Kim pursuant to §
5 547(b), together with prejudgment interest and costs of court. Kim claims that he
6 provided services on behalf of Inland Global after the subject transfers which constituted
7 “new value” under § 547(c)(4) in excess of the transfers sought to be avoided, and
8 therefore, Plaintiff should take nothing by his suit. Alternatively, Kim claims an
9 affirmative defense under § 547(c)(2), arguing that the transfers were in payment of
10 debts incurred by the debtor in the ordinary course of business, made in the ordinary
11 course of business, and according to ordinary business terms.

12 **B. New Value.**

13 Section 547(c)(4) states that the trustee may not avoid under § 547 a transfer to
14 or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave
15 new value to or for the benefit of the debtor –

16 (A) not secured by an otherwise unavoidable security interest; and

17 (B) on account of which new value the debtor did not make an otherwise
18 unavoidable transfer to or for the benefit of such creditor.

19 11 U.S.C. § 547(c)(4). To prevail with the new value defense, Kim must show (a) that
20 he gave unsecured new value to or for the benefit of the debtor; (b) after the preferential
21 transfer; and (c) the debtor did not repay the new value by an otherwise unavoidable
22 transfer. Mosier v. Ever-Fresh Food Co. (In re IRFM, Inc.), 52 F.3d 228, 231 (9th Cir.
23 1995). “The ‘new value’ defense is “grounded in the principle that the transfer of new
24 value to the debtor will offset the payments, and the debtor’s estate will not be depleted
25 to the detriment of other creditors.” Rodgers v. Schneider (In re Laguna Beach Motors,
26 Inc.), 148 B.R. 322, 324 (9th Cir. BAP 1992), quoting In re Auto-Train Corp., 49 B.R.

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1 605, 612 (D.D.C. 1985), aff'd sub nom., Drabkin v. A.I. Credit Corp., 800 F.2d 1153
2 (D.C. Cir. 1986).

3 In this case, Kim testified that, after receiving Check # 70162, he treated
4 "numerous Inland Global patients" from July 8, 2002 to August 8, 2002. Kim reasoned
5 that "[w]ith an estimated patient visit of at least 400 patients during that period at a flat
6 fee charge of \$60 per patient to Inland Global," he "rendered uncompensated urgent
7 care services of more than \$24,000." Kim further testified that, after receiving Check #
8 70774, he treated "numerous Inland Global patients" from August 8, 2002 to October 4,
9 2002. Kim concluded that "[w]ith an estimated patient visit of at least 1,000 patients
10 during that period at a flat fee charge of \$60 per patient to Inland Global," he "rendered
11 uncompensated urgent care services of more than \$60,000."

12 Diamond correctly points out that each subpart of Kim's "Exhibit B contains three
13 pages of a single patient chart and the Court is asked to extrapolate from some
14 estimate the total value of the new value rendered, all without a single bookkeeping
15 record of any sort having been proffered." Other than Kim's uncorroborated estimates,
16 there is no evidence establishing the number of Inland Global patients ostensibly
17 treated by Kim between July 8, 2002 and October 4, 2002. Kim did not offer any
18 evidence, aside from Exhibit B, establishing the actual services provided by Kim to
19 Inland Global patients between July 8, 2002 and October 4, 2002, specifically the (a)
20 identity or patient number of the Inland Global patient receiving the service; (b) date of
21 service; (c) nature of service performed; (d) whether the service was performed
22 individually or on behalf of the corporation; (e) whether the service was authorized
23 under the Ancillary Care Service Agreement; (f) the amount of co-pay, if any, received
24 from the patient for the service, and (g) balance owing for the service. Kim admits not
25 only that billing records for the services exist, but that patient charts for such services
26 are in his possession. Inexplicably none of the documents, except Exhibit B, were

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1 offered into evidence.

2 The defendant in a preferential transfer proceeding has the burden of proving
3 any exceptions to avoidance under § 547(c). 11 U.S.C. § 547(g). See Marshack v.
4 Orange Commercial Credit (In re Nat'l Lumber & Supply, Inc.), 184 B.R. 74, 75 (9th Cir.
5 BAP 1995). With respect to § 547(c)(4), creditors have the burden of establishing with
6 specificity the measure of new value given to the debtor in the exchange. See, e.g.,
7 Official Unsecured Creditors' Comm. v. Airport Aviation Servs., Inc. (In re Arrow Air,
8 Inc.), 940 F.2d 1463, 1466 (11th Cir. 1991); Creditors' Comm. v. Spada (In re Spada),
9 903 F.2d 971, 976 (3rd Cir. 1990); Jet Florida, Inc. v. Am. Airlines, Inc. (In re Jet Florida
10 Sys., Inc.), 861 F.2d 1555, 1559 (11th Cir. 1988). Creditors relying on § 547(c)(4) must
11 also prove that the new value has not been repaid by an otherwise unavoidable
12 transfer. See IRFM, 52 F.3d at 231; Nat'l Lumber, 184 B.R. at 81. Because Kim has
13 failed to establish with specificity the new value given to Inland Global and that the new
14 value was not repaid by an otherwise unavoidable transfer, Kim is not entitled to a new
15 value defense against Diamond's preference claims.

16 **C. Ordinary Course of Business.**

17 Under § 547(c)(2), a trustee may not avoid an otherwise preferential transfer to
18 or for the benefit of a creditor to the extent that such transfer was –

19 (A) in payment of a debt incurred by the debtor in the ordinary course of business
20 or financial affairs of the debtor and the transferee;

21 (B) made in the ordinary course of business or financial affairs of the debtor and
22 the transferee, and

23 (C) made according to ordinary business terms.

24 11 U.S.C. § 547(c)(2). Section 547(c)(2) is comprised of a subjective test and an
25 objective test. See Cocolat, Inc. v. Fisher Dev., Inc. (In re Cocolat, Inc.), 176 B.R. 540,
26 549 (Bankr. N.D. Cal. 1995). The transferee has the burden of proving the defense and
27

1 must prove each of the three elements by a preponderance of the evidence. Arrow
2 Elec., Inc. v. Justus (In re Kaypro), 230 B.R. 400, 404 (9th Cir. BAP 1999), aff'd in part,
3 rev'd in part, 218 F.3d 1070 (9th Cir. 2000).

4 Sections 547(c)(2)(A) & (B), which together form the subjective test, require a
5 creditor to demonstrate that the debt and its payment are ordinary in relation to past
6 practices or a prior course of dealing between the debtor and the creditor. See, e.g.,
7 Sulmeyer v. Suzuki (In re Grand Chevrolet, Inc.), 25 F.3d 728, 732 (9th Cir. 1994); Bell
8 Flavors & Fragrances, Inc. v. Andrew (In re Loretto Winery, Ltd.), 107 B.R. 707, 709 (9th
9 Cir. BAP 1989); Cocolat, 176 B.R. at 549.

10 Section 547(c)(2)(A) focuses on whether the incurrence of debt was ordinary,
11 *i.e.*, whether the debt was incurred by the debtor in the ordinary course of business.
12 See Cocolat, 176 B.R. at 549. Section 547(c)(2)(B) requires the court to examine the
13 following factors to determine if payment of the debt was ordinary in light of past
14 practices between debtor and creditor: (1) the length of time the parties were engaged
15 in the transactions at issue; (2) whether the amount or form of tender differed from past
16 practices; (3) whether the debtor or creditor engaged in any unusual collection or
17 payment activity; and (4) whether the creditor took advantage of the debtor's
18 deteriorating financial condition. See Grand Chevrolet, 25 F.3d at 732; Cocolat, Inc.,
19 176 B.R. at 549.

20 Section 547(c)(2)(C)'s objective test requires a creditor to prove that the
21 payment was ordinary in relation to prevailing business standards. See, e.g., Bank of
22 the West v. Anderson (In re Jan Weilert RV, Inc.), 315 F.3d 1192, 1197 (9th Cir. 2003);
23 In re Food Catering & Housing, Inc., 971 F.2d 396, 398 (9th Cir. 1992). In other words, §
24 547(c)(2)(C)'s objective standard requires proof of "practices common to businesses
25 similarly situated to the debtor and the transferee." Loretto Winery, 107 B.R. at 709. It
26 is not enough to prove what past practices were between the particular creditor and the
27

debtor. Id. The focus of the inquiry is whether the payment practice at issue comports with industry standards. See Jan Weilert, 315 F.3d at 1197. According to the Ninth Circuit:

[T]he creditor must show that the payment he received was made in accordance with the ordinary business terms in the industry. But this does not mean that the creditor must establish the existence of some single, uniform set of business terms We conclude that "ordinary business terms" refers to the range of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of [the ordinary course of business].

Id., quoting In re Tolona Pizza Prods. Corp., 3 F.3d 1029, 1033 (7th Cir. 1993). Section 547(c)(2)(C)'s objective test requires consideration of both the creditor's and the debtor's industries, i.e., "the broad range of terms that encompasses the practices employed by those debtors and creditors, including terms that are ordinary for those under financial distress." Jan Weilert, 315 F.3d at 1198 (citations omitted).

In this case, Kim's ordinary course defense is based primarily upon the following testimony from Kim:

Inland Global paid for my services on a monthly basis, and ordinarily remained current on its flat fee payments to me. At times the payments were up to 30 days late. When Inland Global ceased operations, I used the same contract and terms in an agreement with Upland Medical Group. Upland Medical Group followed the same pattern of payment, remaining current for the most part on its flat fee payments but at times making payments up to 30 days late.

Viewing the evidence in a light most favorable to Kim, the court finds that Kim failed to sustain his burden to establish that the transfers were made in the ordinary course of business and made according to ordinary business terms.

With respect to § 547(c)(2)(B), Kim failed to submit any billing records or a billing history concerning urgent care services rendered on behalf of Inland Global to show the length of time the parties were engaged in the transactions and that the amount or form of tender did not differ from past practices. Nor did Kim introduce evidence to establish that neither Inland Global nor Kim engaged in any unusual collection or payment

1 activity. Even assuming Kim satisfied the subjective test of § 547(c)(2)(A) & (B), there is
2 little credible evidence that the payments were ordinary in relation to prevailing business
3 standards. The fact that Kim experienced the "same pattern of payment" with Upland
4 Medical Group does not satisfy Kim's burden to establish that Inland Global's payments
5 to Kim comported with industry standards. Kim did not offer any expert testimony
6 concerning the credit arrangements between other similarly situated debtors and
7 creditors in the industry nor any expert opinion as to whether Inland Global's payment
8 practices were consistent with what takes place in the industry. See In re Hessco
9 Indus., Inc., 295 B.R. 372, 376 (9th Cir. BAP 2003) (stating that Jan Weiler's
10 considerable relaxation of the burden on preference defendants in proving their
11 affirmative defenses under § 547(c)(2)(C) . . . [does] not relieve them of the requirement
12 to proffer some evidence to sustain that burden"). Based on the foregoing, the court
13 finds that Kim is not entitled to an ordinary course defense against Diamond's
14 preference claims.

15 CONCLUSION

16 For the foregoing reasons, the court will enter judgment awarding the sum of
17 \$78,515.69 to Diamond pursuant to § 547(b), together with prejudgment interest from
18 December 21, 2004, to entry of judgment, and costs of court. A separate judgment will
19 be entered consistent with this opinion.

20 DATED:

21 APR 04 2006



PETER H. CARROLL
United States Bankruptcy Judge

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*Physically attach this form as the last page of the proposed Order or Judgment.
Do not file this form as a separate document.*

In re INLAND GLOBAL MEDICAL GROUP, INC.,	CHAPTER <u>7</u>
Debtor.	CASE NUMBER RS 04-02244 PC

**NOTICE OF ENTRY OF JUDGMENT OR ORDER
AND CERTIFICATE OF MAILING**

TO ALL PARTIES IN INTEREST ON THE ATTACHED SERVICE LIST:

1. You are hereby notified, pursuant to Local Bankruptcy Rule 9021-1(a)(1)(E), that a judgment or order entitled
(specify): MEMORANDUM DECISION

was entered on (specify date): **APR 05 2006**

2. I hereby certify that I mailed a copy of this notice and a true copy of the order or judgment to the persons and
entities on the attached service list on (specify date):

APR 05 2006

Dated: **APR 05 2006**

JON D. CERETTO
Clerk of the Bankruptcy Court

By:


Deputy Clerk

Service List

Sandor T. Boxer, Esq.
Law Offices of Sandor T. Boxer
12400 Wilshire Blvd., Suite 1300
Los Angeles, CA 90025-1030

Stephen R. Wade, Esq.
Law Offices of Stephen R. Wade
400 N. Mountain Avenue, Suite 214B
Upland, CA 91786